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No. 04-108

IN THE

Supreme Court of the United States

SUSETTE KELO, ET AL.,

Petitioners,

v.

CITY OF NEW LONDON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

BRIEF AMICUS CURIAE OF THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
MICHAEL D. MCGILL
DAVID J. MICHNAL
TODD R. OVERMAN
ANDREW T. REES
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF AMICUS CURIAE OF THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Property Rights Foundation of America, Inc. ("PRFA"), is a nonprofit organization based in New York State and dedicated to providing information and education and promoting understanding about the fundamental constitutional rights of America's citizens, especially the right to own and use private property. PRFA is a volunteer, grassroots organization committed to assisting citizens, policymakers, and those in the media concerned with protecting the rights of property owners against governmental abuse.

PRFA has been recognized for its public events, publications, and outreach programs. PRFA sponsors the Annual New York Conference on Private Property Rights, where

experts from across the country speak on topics of prime importance to property rights advocates and policymakers. In addition, since 1994, PRFA has published *Positions on Property*, which initially cataloged and exposed the multitude of land use regulations and controls in New York State. Finally, PRFA helps other grassroots organizations seeking advice or assistance by connecting them to PRFA's National Advisory Board and other experts.

PRFA has a particular interest in *Kelo* v. *City of New London*, 843 A.2d 500 (Conn. 2004), because this case raises a constitutional question of fundamental importance—namely, what limits does the Constitution impose when government decides to take property from one private party and transfer it to another private party for the stated purpose of stimulating economic development? As the sad facts of this case show, residents of the Fort Trumbull area of the City of New London stand to lose cherished family homes for the sake of projected job creation and tax revenues. PRFA believes that the City's condemnation actions are a misuse of its eminent domain power, particularly since the Fort Trumbull area is in no sense a slum or blighted area.

Unfortunately, and of great concern to PRFA, the affected residents of Fort Trumbull are not alone. Across the Nation, local governments are taking private property to permit its development by private entities as an exercise of the authority to take property for public use. *See, e.g., County of Wayne* v. *Hathcock*, 2004 WL 1724875 (Mich. July 30, 2004) (involving Wayne County's plan to condemn real property and transfer it to private parties for the construction of a business and technology park). This case presents an opportunity for this Court to clarify the limits of government's ability to use the eminent domain power to transfer private property from the hands of one party to the hands of another, and to ensure that, when state and local governments take private property for the purpose of economic development, such a taking is in fact for a valid public use.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a); the requisite consent letters have been filed with the Clerk.[1]

INTRODUCTION

In the decision below, the Connecticut Supreme Court, both the Justices in the majority and those who dissented, agreed that the taking of private property for the purpose of economic development can, in a proper case, be a permissible taking for "public use." But the four Justices in the majority and the three dissenters fundamentally disagreed about what standards a reviewing court should apply in deciding whether a particular taking for that purpose is, in fact, a valid taking for public use.

The majority held that an economic development taking is for public use so long as "the development plan primarily was *intended* to benefit the public interest, rather than private entities." 843 A.2d at 543 (emphasis added). Furthermore, the majority indicated that the trial court properly "[a]ssum[ed] * * * to be correct" the City's economic development projections. *Id.* at 542. Finally, the majority reviewed the trial court's determination that the taking was primarily intended to benefit the public as "a question of fact that we review pursuant to the clearly erroneous standard of review." *Id.* at 540.

In sharp contrast to the approach taken by the majority, the dissenters concluded that the fact "that the development plan was intended primarily to benefit the public, per se, is insufficient to justify the takings." *Id.* at 596 (Zarella, J., concurring in part and dissenting in part). Rather, in the view of the dissenters, "the taking party must assume the burden of proving, by clear and convincing evidence, that the antici-

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Property Rights Foundation of America, Inc., its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

pated public benefit will be realized." *Id.* Finally, the dissenters would have had appellate courts "review de novo the [trial] court's legal determination that the takings primarily were intended to serve the public interest." *Id.* at 595.

Thus, the majority and the dissenters disagreed whether the government's intent to benefit the public through economic development is enough to support a taking; whether a reviewing court should assume that the benefits of development projected by the government will, in fact, come to pass or should instead require the government to prove they will; and whether an appellate court should review a trial court's public interest determination de novo or under a deferential standard.

The sharp division between the Justices of the Connecticut Supreme Court reflects the fact that this Court's cases do not provide clear guidance to courts reviewing the constitutionality of economic development takings and that lower courts have struggled to come up with appropriate standards on their own.

SUMMARY OF ARGUMENT

This Court's precedents construing the Public Use Clause of the Fifth Amendment do not address whether or when government can take property from one private party and transfer it to another private party for the purpose of economic development. Those precedents, therefore, do not control this case or answer the question presented here. Nor do those cases stand as clear authority for the decision of the Connecticut Supreme Court in this case.

Furthermore, the decision below is inconsistent with decisions of the Court of Appeals for the Seventh and Ninth Circuits, and such inconsistency between the decision of a state supreme court and federal circuit court decisions warrants this Court's review.

This Court should clarify the meaning of the public use requirement in the context of government's taking of property for the purpose of economic development, as the lower

courts have struggled to find the proper standard for determining whether such a taking is for public use.

Finally, this Court's cases and the history of the public use requirement casts doubt upon the government's ability to transfer property from one private party to another private party for the purpose of economic development.

ARGUMENT

I. *BERMAN* AND *MIDKIFF* DO NOT CONTROL THIS CASE OR ANSWER THE QUESTION PRESENTED.

The first reason why the writ should be granted is that the Connecticut Supreme Court's decision in this case countenances an eminent domain power beyond that which this Court's cases construing the Fifth Amendment's Public Use Clause have authorized. The court below cited this Court's decisions in *Berman* v. *Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984), as supporting what it called "[t]he broad purposive approach to the interpretation of the federal public use clause." *Kelo*, 843 A.2d at 526. Relying on *Berman* and *Midkiff*, the Connecticut Supreme Court held that "an economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development, constitutes a valid public use for the exercise of the eminent domain power." *Id.* at 528.

In *Berman*, this Court held that the eradication of blighted conditions is a public purpose sufficient to satisfy the Fifth Amendment's "public use" limitation on the exercise of the eminent domain power. 348 U.S. at 32-33. This Court explained that the power of eminent domain is a "means to [an] end," and, therefore, if the "object" or purpose of a taking is within the authority of the sovereign, the authority to use eminent domain to accomplish that purpose necessarily lies. *Id.* at 33. This Court then determined that the "end" of abating the blighted conditions found in a particular Washington, D.C., community justified the use of the emi-

nent domain power. The Court's opinion emphasized the unique and manifest public harm presented by blight:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river. [*Id.* at 32-33.]

In this case, the New London Development Corporation is proceeding under Chapter 132 of Connecticut's General Statutes—a chapter governing municipal development—not under Chapter 130, which authorizes the use of eminent domain to clear slums and blighted areas. As this case does not involve Connecticut's blight statute—or even an allegation of blight—*Berman* does not control here. Furthermore, the state of the condemned property in *Berman* was extraordinary, with staggering rates of property degradation. *See Berman*, 348 U.S. at 30. Here, no party asserts that the Fort Trumbull neighborhood in which petitioners' property is located is a slum or blighted area or in any way approaches such "misery of housing." *Id.* at 33. Therefore, the issue in this case is not settled by this Court's holding in *Berman*.

In *Midkiff* this Court clarified that the "public use" requirement of the Fifth Amendment is "coterminous with the scope of a sovereign's police powers." 467 U.S. at 240. And this Court further explained that a reviewing court must defer to a governmental exercise of eminent domain authority so long as the government's "purpose is legitimate and its means are not irrational." *Id.* at 242-243. Stating that the regulation of oligopolies is "a classic exercise of a State's police powers," this Court determined that the dissolution of a feudal landownership system was a satisfactory public purpose justifying the taking of private property. *Id.* at 242. Therefore, under *Midkiff*, the central consideration is whether the purpose of the taking is within the sovereign's police

power, *i.e.*, the power to enact regulations substantially related to the advancement of the public health, safety, morals or general welfare. *See Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

Under *Berman* and *Midkiff*, a sovereign may choose any rational means to accomplish a constitutionally-permissible end, and hence judicial review of a condemnation action must focus on the public purpose asserted by the government. But *Berman* and *Midkiff* do not stand for the proposition that all asserted public purposes satisfy the public use requirement of the Fifth Amendment. On the contrary, the Public Use Clause must place some cognizable limit on the power to condemn property, as this Court has recognized. *See Midkiff*, 467 U.S. at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."); *Thompson* v. *Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937).

The takings in both *Berman* and *Midkiff* share two characteristics that are absent in the case of an economic development taking. First, the taking of property in those cases directly resulted in an immediate public benefit. The removal of blight in *Berman* was accomplished when the government transferred possession of the blighted area, and, similarly, the dissolution of the land oligopoly in *Midkiff* was accomplished by the act of transferring the property, regardless of its proposed future use. Second, in both cases the public benefit flowed from the actions of the government itself.

In contrast to the *Berman* and *Midkiff* takings, where, as here, a taking is justified on the basis of economic development, the public benefit is uncertain, as there is no guarantee that the expected development will materialize, and any public benefit that is achieved will be attenuated in time from the taking of property. Furthermore, the public benefit, if any, to be achieved by an economic development taking ultimately is dependent upon the efforts of a private party, not the government. If the private party to whom the prop-

erty is transferred does not succeed in its venture, no public benefit is ever realized. Thus, an economic development taking differs from takings of the sort approved in *Berman* and *Midkiff* because such a taking proceeds on the theory that the transfer of property from one private party to another—which is not a permissible end or a public benefit in and of itself—will confer a "trickle down" benefit upon the public at large.

Because the benefits to be gained from an economic development taking are necessarily uncertain and indirect, judicial review of the public purpose of such a taking is a difficult task. Under the standard employed by the Connecticut Supreme Court, judicial review is limited to an evaluation of the legislature's stated purpose for the taking. That standard, however, gives government carte blanche to take private property from one person and transfer it to another person, limited only by the government's willingness or ability to proclaim that its intent is to promote economic development. Therefore, takings justified solely on the basis of a prospective public benefit from economic development would seem to warrant greater scrutiny under the Fifth Amendment.

In short, this case presents a significant question unsettled by either *Berman* or *Midkiff*: assuming that a sovereign may condemn property for the purpose of job creation and increased tax revenue, under what standard should a court review the public purpose of such a condemnation? This Court has never considered the constitutionality of a taking based *solely* on a legislative determination, necessarily subjective and speculative, that the taking will result in future private economic development and the attendant increase in tax revenue and employment. This Court should grant the writ in this case to clarify whether the Public Use Clause of the Fifth Amendment places *any* meaningful restriction on legislative power to take property for the purpose of private economic development and the associated, but potential, increase in tax revenue and jobs.

II. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THE SEVENTH AND NINTH CIRCUITS.

Petitioners have set forth the numerous state supreme court decisions with which the decision below conflicts. *See* Pet. 10-21; *see also Kelo*, 843 A.2d at 532 ("We acknowledge that the courts of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina and Washington have * * * ruled that economic development is, by itself, not a public use for eminent domain purposes."). But the decision below also conflicts with decisions of the Seventh and Ninth Circuits interpreting the Public Use Clause. Such a conflict provides further grounds for review by this Court. *See* S. Ct. R. 10(b).

In *Daniels* v. *Area Plan Commission*, 306 F.3d 445 (7th Cir. 2002), the Area Plan Commission of Allen County, Indiana, sought to facilitate commercial development within a residential subdivision by vacating a restrictive covenant that limited the subdivision to residential use and then rezoning certain lots to allow such development. *See id.* at 449-450. Because such a covenant is a constitutionally-protected property interest, the Plan Commission could take that property only for a public purpose. *See id.* at 459.

The Seventh Circuit held that the required public purpose was lacking. The court explained that, because "it is apparent that the public benefit of the vacation and rezoning action will not materialize absent any promised commercial development of the [l]ots," the developer "is thus the primary beneficiary of the vacation of the restrictive covenant, and not Allen County." *Id.* at 462. The Seventh Circuit also reasoned that

> while in this case there may be some conceivable public benefit of some possible future use of the property, * * * "public use" is to be determined at the time of the taking, and at the time of the taking of the restrictive covenant, the possible future commercial development could not be rationally described as for a public purpose. [*Id.* at 466.]

Unlike *Daniels*, the decision below holds that the primary beneficiary of a taking in which property is transferred from one private party to another for the purpose of economic development is the public, not the developer. And, again unlike *Daniels*, the decision below did not determine "public use" at the time of the taking.[2]

In *Armendariz* v. *Penman*, 75 F.3d 1311 (9th Cir. 1996), officials of the City of San Bernadino, California, conducted sweeps of low income housing units in search of housing code violations. The plaintiffs, the owners of these units, alleged that the sweeps were conducted as part of a scheme to deprive them of their property—either by forced sale, driving down the market value of the properties, or foreclosure—so that a shopping center developer could buy the units at a lower price. *See id.* at 1313-15.

The Ninth Circuit held that, if the plaintiffs could prove their allegations, the actions of the defendant officials would be a taking of property, not "for a 'public use' as the Fifth Amendment requires but rather for the use of another private person, the shopping-center developer." *Id.* at 1321. The Ninth Circuit went on to say that

> If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a "public use," and if those officials could later justify their decisions in court merely by positing "a conceivable public purpose" to which the taking is rationally related, the "public use" provision of the Takings Clause would lose all power to restrain government takings. [*Id.*]

See also 99 Cents Only Stores v. *Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129-31 (C.D. Cal. 2001) (holding that a plan condemning commercially viable property in order to transfer such property to another private

[2] Notably, the *Daniels* court distinguished *Midkiff* on the ground that "[i]n *Midkiff*, the actual act of the transfer, regardless of the proposed use of the property, was found to serve a public purpose." 306 F.3d at 465. *See supra* at 7.

entity for more lucrative use was an unconstitutional private taking), *appeal dismissed as moot and remanded*, 60 Fed. Appx. 123 (9th Cir. 2003).

Thus, the Ninth Circuit in *Armendariz* held that government cannot take private property from its current owner solely to allow that property to be owned instead by a private developer. Such a purpose, without more, does not constitute a constitutionally-permissible public use.

III. THIS COURT SHOULD CLARIFY THE PUBLIC USE REQUIREMENT OF THE FIFTH AMENDMENT.

Although this Court provided general guidance with respect to the meaning of the Fifth Amendment's "public use" requirement in *Berman* and *Midkiff*, the lower courts continue to struggle with the issue, particularly in cases involving the use of eminent domain authority to transfer property from one private party to another. Indeed, commentators who have analyzed the application of *Berman* and *Midkiff* in state court cases have observed that state courts often do not give to legislative determinations of public use the high degree of deference this Court gave to such determinations in *Berman* and *Midkiff*.[3]

Some commentators have applauded this development, arguing that the deferential approach to the public use question taken by this Court in *Berman* and *Midkiff* is not

[3] *See, e.g.*, Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, 564 (2002) ("[S]tate courts are split regarding whether strict scrutiny or rational relationship review, employed by most federal courts, is the appropriate standard to evaluate public use justifications."); Glen E. Summers, Note, *Private Property Without* Lochner*: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 866-867 (1993) ("[S]tate courts are frequently willing to depart from *Berman*'s virtual abandonment of judicial review in their treatment of public use questions in Takings Clause analysis.") (quotation omitted).

appropriate in eminent domain cases.[4] Professor Nicole Garnett recently examined a number of federal and state cases holding the government to an arguably higher standard than the rational-basis test applied in *Midkiff*. These decisions instead "requir[ed] a demonstrated connection between the challenged taking and the particular purpose used to justify it." Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 936 (2003) (citing *Daniels* v. *Area Plan Comm'n*, *supra*, *99 Cents Only Stores*, *supra*, and *Southwestern Ill. Dev. Auth.* v. *National City Envtl., LLC*, 768 N.E.2d 1 (Ill.) ("*SWIDA*"), *cert. denied*, 537 U.S. 880 (2002)). In her view, "[t]he courts were justifiably frustrated with the *Midkiff* straightjacket and underwent doctrinal contortions to escape it," and she suggested that "*Midkiff* needs to be supplemented with precisely the kind of means-end scrutiny employed in these recent cases." *Id.* Similarly, Professor James Ely has noted that "there is some recent indication that lower federal and state courts are more willing to review the use of eminent domain to make certain that property is not being taken primarily for private benefit." James W. Ely Jr., *Can the "Despotic Power" Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, 17 Prob. & Prop. 31, 35 (2003) (citing *99 Cents Only Stores*, *supra*, and *SWIDA*).

The unease of some lower courts in taking a *Midkiff*-style deferential approach to the public use question in the eminent domain context was punctuated by the Michigan Supreme Court's recent decision in *County of Wayne* v. *Hathcock*, *supra*, overruling its earlier decision in *Poletown Neighbor-*

[4] *See, e.g.*, Tiffiny Anne Douglas, Note, *Florida's Take on Takings: An Appeal to Re-Balance the Individual's Rights and the State's Needs*, 4 FLA. COASTAL L.J. 207, 211, 230 (2003) (*Berman* and *Midkiff*, "though clearly defining the standard, are distinguishable from current eminent domain cases involving redevelopment plans. * * * [A]lthough the precedent established thus far emphasizes the broad deference given to the legislative determinations of public use, the court must re-analyze the use of the 'rational basis' test in the context of eminent domain.").

hood Council v. *Detroit*, 304 N.W.2d 455 (Mich. 1981).[5] The *Hathcock* court ruled that the use of eminent domain to create a business and technology park projected to create tens of thousands of new jobs and generate hundred of millions of dollars in tax revenues was not a taking for a "public use" because the individual properties within the park eventually would be converted to private ownership. Explaining its decision to overrule *Poletown*, the court stated:

> To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. [*Hathcock*, 2004 WL 1724875, at *15 (emphasis in original).]

The *Hathcock* court stated that "the transfer of condemned property to a private entity * * * would be appropriate in one of three contexts" only: (1) "where public necessity of the extreme sort requires collective action" (as in the construction of highways and railroads); (2) "where the property remains subject to public oversight after transfer to a private entity"; or (3) "where the property is selected because of facts of independent public significance, rather than the interests of the private entity to which the property is eventually transferred" (as in the clearance of slums). *Id.* at *12 (internal quotation marks omitted).[6]

[5] In *Poletown*, property was conveyed to a private corporation to permit the construction of an assembly plant. For more than 20 years, *Poletown* epitomized the doctrine of judicial deference to legislative judgments of "public purpose" and was a leading case for the proposition that a generalized economic benefit is sufficient to transfer condemned property to a private entity.

[6] Although *Hathcock* is a significant case, the court's decision was based on the Michigan Constitution, not the Fifth Amendment's Public Use Clause. Therefore, that case does not supply grounds for letting the federal issue percolate further.

IV. THIS COURT'S CASES AND THE HISTORY OF THE PUBLIC USE REQUIREMENT CAST DOUBT UPON GOVERNMENT'S ABILITY TO TRANSFER PROPERTY FROM ONE PRIVATE PARTY TO ANOTHER FOR THE PURPOSE OF ECONOMIC DEVELOPMENT.

This Court's cases have long recognized that the "public use" restriction in the Fifth Amendment was intended to place a limit on the government's ability to take private property. Certainly, that restriction prohibits the taking of private property from one person for the private benefit of another. As early as *Calder* v. *Bull*, 3 U.S. 386 (1798), it was stated that "[i]t is against all reason and justice, for a people to entrust a Legislature with" the power to enact "a law that takes property from A. and gives it to B," and therefore the legislature cannot be presumed to have such a power. *Id.* at 388 (opinion of Chase, J.).

In *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. 304 (1795), Justice Patterson considered "whether the Legislature had authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation." *Id.* at 310. Acknowledging that "the despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government," he stated that it is "difficult to form a case in which the necessity of a state can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen." *Id.* at 310-311.

Similarly, in *Wilkinson* v. *Leland*, 27 U.S. 627 (1829), Justice Story wrote:

> We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. [*Id.* at 658.]

And in *Missouri Pacific Railway* v. *Nebraska*, 164 U.S. 403 (1896), this Court concluded that a state court order requiring a railroad to surrender a portion of its land to petitioners to permit them to build an elevator "was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners." *Id.* at 417. This Court held that "[t]he taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States." *Id.*

The principle that government cannot take one person's property and give it to another private individual, even upon the payment of just compensation, was put to the test by the so-called Mill Acts enacted beginning in 1667 and well into the late 1800's by a number of American colonies and states. Some of these Mill Acts authorized the private condemnation of land necessary for the operation of a mill. For example, a miller owning land on one river bank who needed to dam the river in order to power his mill could condemn land on the opposite river bank owned by another person who refused to sell the property.[7]

At first blush, the Mill Acts would seem to violate the notion that private property cannot be transferred from one person to another for the latter's private benefit. Closer examination, however, reveals that the mill owner's exercise of eminent domain was more akin to the taking of land by a public utility than to a taking by a private developer.

In the 18th and early 19th centuries, the flow of water was the primary source of mechanical power in America—not overtaken until the 1860's by the steam engine—and thus was indispensable to the milling of grain in a predominantly

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[7] *See* Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 DUKE L.J. 339, 369-375 (1999); Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59, 71-75 (1996).

agrarian society. *See* Melton, *supra* note 7, at 73. The Mill Acts therefore served a necessary public purpose—the harnessing of a very limited source of power to process food. And like modern-day regulation of public utilities, Mill Acts regulated both price and public access. North Carolina's Mill Act, for example, provided for the designation of "Public Mills" and required mill owners to "grind Wheat and Indian Corn for all such Persons as shall require the same."[8] Additionally, North Carolina, Virginia, Vermont, and other states set maximum rates to be charged for milling service. *See* Sales, *supra* note 7, at 373 & nn.165-166.

That Mill Act condemnations served a public purpose was recognized by the courts. In *Harding* v. *Goodlett*, 11 Tenn. 41, 1832 WL 1095 (Tenn. Err. & App. 1832), the Tennessee Supreme Court of Errors and Appeals stated:

> It is emphatically a public use for which [property condemned for the purpose of building a grist-mill] is required and to which it is appropriated. The grist-mill is a public mill. The miller is a public servant. He is allowed a compensation for grinding. His duties as a miller are prescribed, and penalties are imposed for a violation of any of those duties; and he is exempted, in consequence of his character of miller, and for the benefit of the public, from performance of certain duties to which other citizens are subjected. [1832 WL 1095, at *7.]

In contrast, said the court, "[t]he saw-mill and paper-mill have no public character; the erection of these mills would be wholly for the private use of these petitioners. To take [a citizen's] land for such use would be unconstitutional." *Id.*[9]

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[8] North Carolina Mill Act art. V, *reprinted in* 1 The Earliest Printed Laws of North Carolina, 1669-1751, at 18-19 (John D. Cushing ed., 1977).

[9] *See also Tyler* v. *Beacher*, 44 Vt. 648, 1871 WL 5994 (1871) ("Decisions from Virginia, North Carolina, Kentucky, Tennessee, and Georgia, are sometimes cited in support of the right to take property in this manner for mills. But in all these States the mills were made public mills, by being required by law to grind for all in due turn for regulated tolls, and in some of them the mills were made public by more explicit provisions.").

Thus, the Mill Acts actually support the early understanding that property can be taken from one private party to serve a public purpose, but not for the mere benefit of another private party.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
MICHAEL D. MCGILL
DAVID J. MICHNAL
TODD R. OVERMAN
ANDREW T. REES
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amicus Curiae

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